No. 00-952

Supreme Court, U.S.
FILED
JUN 8 200
CLERK

In The

Supreme Court of the United States

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

Petitioner,

v.

IRENE BLUMER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS, DISTRICT IV

PETITIONER'S REPLY TO BRIEF OF UNITED STATES AS AMICUS CURIAE

JAMES E. DOYLE*
Attorney General

MAUREEN MCGLYNN FLANAGAN
Assistant Attorney General

Attorneys for Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1780
**Counsel of Record*

TABLE OF CONTENTS

Page

CONCLUSION 4

CASES CITED

Batterton v. Francis,
432 U.S. 416 (1977) 3

Chevron, U.S.A., Inc. v. Natural Resources Defense,
467 U.S. 837 (1984) 3

FEDERAL REGULATIONS AND STATUTES CITED

59 Fed. Reg. 1659 (Jan. 12, 1994) 3

59 Fed. Reg. 37702 (July 25, 1994) 3

42 U.S.C. § 1396r-5 2

42 U.S.C. § 1396r-5(e)(2)(C) 2, 3, 4

No. 00-952

In The

Supreme Court of the United States

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

Petitioner,

v.

IRENE BLUMER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS, DISTRICT IV

PETITIONER'S REPLY TO BRIEF OF UNITED STATES AS AMICUS CURIAE

Petitioner Department respectfully submits that the Solicitor General's argument does not support the conclusion that this Court should deny certiorari. Rather, the analysis of the question presented by the Solicitor General demonstrates, with remarkable clarity, why this Court should *grant* certiorari.

The Solicitor General candidly acknowledges that the criteria justifying a grant of certiorari are fully presented in this case:

- The decision of the Wisconsin Court of Appeals conflicts with the decisions of two federal courts of appeals and of two state high courts, each of which has upheld the income-first methodology (*see* Solicitor General's Brief (Brief) at 10-14 and 16).

- The case concerns a matter of substantial importance to the states and to Medical Assistance (MA) claimants in the administration of the MA program (*see* Brief at 11 and 13).

- The decision of the court below holding that 42 U.S.C. § 1396r-5(e)(2)(C) unambiguously forbids use of the income-first methodology is incorrect, and is inconsistent with the legislative history of that provision and with the language of the spousal impoverishment statute as a whole (*see* Brief at 10 and 13-17).

Despite the existence of the criteria supporting a grant of certiorari, the Solicitor General argues that review is inappropriate simply because the Department of Health and Human Services (HHS) now intends to publish a notice of proposed rulemaking within the next 90 days (*see id.* at 11-12 and 17-24). Even if HHS eventually develops administrative rules concerning the spousal impoverishment provisions of 42 U.S.C. § 1396r-5, however, that process will require a

minimum of several years.[1] Meanwhile, Wisconsin will be required to abide by what the Solicitor General persuasively demonstrates is a fundamentally erroneous decision of the Wisconsin Court of Appeals at a cost of millions of dollars to Wisconsin alone. *See* Brief at 13 and 23.[2]

Moreover, the fundamental question squarely presented here will remain unresolved, and, in fact, cannot be resolved by the HHS rule-making process. In this case *and* under future HHS rules, the preliminary questions remain: Does 42 U.S.C. § 1396r-5(e)(2)(C) plainly and unambiguously foreclose the income-first methodology, as the court below held? Or is it silent or ambiguous so as to permit use of the income-first methodology, as federal and state high courts have held? *Cf. Chevron, U.S.A., Inc. v. Natural Resources Defense*, 467 U.S. 837, 842-43 (1984). Thus, the question whether 42 U.S.C. § 1396r-5(e)(2)(C) permits or forecloses the income-first methodology used by Wisconsin and many other states will not be resolved by promulgation of HHS rules but must be decided finally by the courts.

---

[1]The complexity of the MA program and the procedure for adopting administrative rules typically require five or more years to finalize a particular set of rules. Two recent MA rules required six years and eight and one half years, respectively, for promulgation (*see* Medicaid Home and Community-Based Waiver rules published at 59 Fed. Reg. 37702 (July 25, 1994); and rules governing "Deduction of Incurred Medical Expenses (Spenddown)" published at 59 Fed. Reg. 1659-61 (Jan. 12, 1994)).

[2]*Batterton v. Francis*, 432 U.S. 416 (1977) is inapposite to the grant or denial of certiorari in this case. The question presented the first time that case came before this Court was whether a state rule conflicted with a federal rule, and a revised federal rule was "then-forthcoming." *Id.* at 421. Furthermore, the claimed conflict here is whether the state rule conflicts with the federal statute itself, not, as in *Batterton*, with a federal regulation.

Absent a grant of certiorari, the only logical and just disposition based on the Solicitor General's brief is summary reversal of the decision of the court below under Rule 16.1. As the Solicitor General persuasively demonstrates, the Wisconsin Court of Appeals' decision that 42 U.S.C. § 1396r-5(e)(2)(c) unambiguously forbids use of the income first methodology is simply wrong. Moreover, the income-first methodology is an entirely reasonable interpretation of the existing spousal impoverishment statute. *See* Brief at 10 and 13-17.

CONCLUSION

This Court should grant the petition for certiorari. Alternatively, this Court should summarily reverse the decision of the Wisconsin Court of Appeals, District IV, and reinstate the judgment of the trial court.

Respectfully submitted,

JAMES E. DOYLE*
Attorney General

MAUREEN MCGLYNN FLANAGAN
Assistant Attorney General

Attorneys for Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1780

**Counsel of Record*

June 2001